

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

JUN 10 2003

Michael N. Milby, Clerk of Court

UNITED STATES OF AMERICA

v.

JAMIE OLIS,  
GENE SHANNON FOSTER and  
HELEN CHRISTINE SHARKEY

§  
§ CRIMINAL NO. 03-217  
§  
§ Count 1: 18 USC § 371  
§ Conspiracy to Commit  
§ Securities Fraud, Mail  
§ Fraud and Wire Fraud  
§ Count 2: 15 USC § 78j(b) & 78ff  
§ Securities Fraud  
§ Count 3: 18 USC § 1341  
§ Mail Fraud  
§ Counts 4 - 6: 18 USC § 1343  
§ Wire Fraud

INDICTMENT

THE GRAND JURY CHARGES THAT:

COUNT ONE

Conspiracy - 18 USC § 371

A. INTRODUCTION

At all times material to this Indictment:

1. JAMIE OLIS was employed by Dynegy, Inc. as Senior Director of Tax Planning and International during 1999, 2000, and 2001 and as Vice-President of Finance during 2002. Jamie OLIS was a Certified Public Accountant licensed by the State of Texas.

2. GENE SHANNON FOSTER was employed by Dynegy, Inc. and served as Vice President of Tax during 2000, 2001, and 2002. Gene Shannon FOSTER was a Certified Public Accountant licensed by the State of Texas.

3. HELEN CHRISTINE SHARKEY was employed by Dynegy, Inc. as a member of the Risk Control Group until she moved to the Deal

Structure Group in August 2000. Helen Christine SHARKEY moved to the Asset Management Group in August 2001. Helen Christine SHARKEY was a Certified Public Accountant licensed by the State of Texas.

4. Dynegey, Inc. was a publicly-traded corporation incorporated under the laws of the State of Illinois with its headquarters and principal operations in Houston, Texas. Dynegey Inc. was a public company whose stock was: (1) registered and issued under Section 12 of the Securities Exchange Act of 1934 and (2) publicly traded on the New York Stock Exchange, a national securities exchange. Dynegey Inc. had shareholders located throughout the United States, including within the Houston Division of the Southern District of Texas.

5. Dynegey Inc., its subsidiaries and special purpose entities (hereinafter collectively, "Dynegey") was engaged in a variety of interstate and international business activities, including "energy trading". "Energy trading" refers to the purchase and sale of contracts for the delivery of energy-related commodities, such as natural gas and electricity. Such contracts are often referred to as "energy derivatives" because the asset being traded is a contract derived from the actual or anticipated existence of an energy commodity rather than the commodity itself.

6. As an issuer of publicly-traded stock registered under Section 12 of the Securities Exchange Act of 1934, Dynegey was required to comply with the rules and regulations of the United States Securities and Exchange Commission ("SEC"). These rules and

regulations were created to protect the members of the investing public by, among other things, ensuring that the results of Dynegy's operations were accurately reflected in financial statements filed periodically with the SEC and made available to the investing public.

7. Under SEC rules and regulations, Dynegy and its officers had a duty to file with the SEC quarterly reports on Form 10-Q and annual reports on Form 10-K that included financial statements accurately presenting Dynegy's financial condition and results of business operations. The financial statements were required to disclose, among other things, Dynegy's income, its cash flow from operating activities (operations) and its cash flow from financing activities (debt). This information revealed whether Dynegy's cash flow(s) had been generated by business activities or had been borrowed. The investing public was entitled to, and did, rely upon the information in Dynegy's financial statements in making investment decisions, including the decision whether to buy or sell Dynegy stock.

8. Dynegy's activities and financial statements were the subject of scrutiny by various credit analysts, such as Moody's Investors' Service ("Moody's"), Standard & Poor's ("S&P"), and Fitch Ratings ("Fitch") (collectively hereinafter referred to as the "Rating Agencies"), which assign credit ratings to energy companies and then disclose these ratings to lenders, market and securities analysts, and the public. Credit ratings affect a

company's cost of borrowing money. Credit ratings assigned by Ratings Agencies are based primarily on two ratios: (1) the ratio between the company's Funds From Operations and its Debt and (2) the ratio between the company's Funds From Operations to its Interest (together, "the Ratings Ratios"). The amounts assigned to Funds From Operations (which includes "operating cash flow(s)"), Interest and Debt are obtained by the Rating Agencies from the information on the financial statement the company provides to the SEC and to the public. Therefore, as a company's "operating cash flow(s)" change(s), so do the Ratings Ratios.

9. At least one Rating Agency placed Dynegy's credit rating under review for a possible downgrade in the late summer of the year 2000, raising the specter of higher borrowing costs for Dynegy.

10. Dynegy supplemented its publicly-filed financial statements with comments, or "guidance," concerning its ongoing and anticipated performance.

11. Professional market and securities analysts and media outlets, including the Wall Street Journal, closely followed and relied upon both Dynegy's financial statements and its "guidance" in evaluating Dynegy's current performance and in predicting its future performance. Many of these professional market and securities analysts and media outlets then disseminated to the investing public their own views of the company's current and expected performance, and these views were relied upon by the

investing public in making investment decisions concerning whether to buy and sell Dynegy stock.

12. On September 20, 2000, the Wall Street Journal questioned the quality of the earnings reported by Dynegy's principal business segment--energy trading activities. The Wall Street Journal noted that Dynegy was reporting income from its long-term energy contracts based upon what Dynegy said these contracts were "worth". The Wall Street Journal questioned the quality and reliability of Dynegy's estimates, and thus, the resulting earnings. Noting that Dynegy's energy trading contracts did not seem to be generating "operating cash flows" at the level to be expected if Dynegy's earnings estimates were valid, the Wall Street Journal, in essence, was questioning whether Dynegy's earnings profile justified Dynegy's stock price.

B. THE CONSPIRACY

13. From on or about August 2000 and continuing through on or about April 2, 2002, in the Houston Division of the Southern District of Texas, and elsewhere, the Defendants,

JAMIE OLIS

GENE SHANNON FOSTER

and

HELEN CHRISTINE SHARKEY

did knowingly combine, conspire, confederate and agree with each other and others known and unknown to the Grand Jury to commit the following offenses against the United States:

- a. To knowingly devise and intend to devise a scheme and artifice to defraud, and for obtaining money by means of false and fraudulent pretenses, representations, and promises, and to knowingly use and cause to be used the United States mails and private and commercial interstate carriers for the purpose of executing the scheme and artifice to defraud, in violation of 18 U.S.C. § 1341; and,
- b. To knowingly devise and intend to devise a scheme and artifice to defraud, and for obtaining money by means of false and fraudulent pretenses, representations, and promises, and to knowingly transmit and cause to be transmitted by means of wire, radio, or television communication, and writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, in violation of 18 U.S.C. § 1343; and,
- c. To unlawfully, willfully and knowingly, by use of means and instrumentalities of interstate commerce and the mails, directly and indirectly use and employ manipulative and deceptive devices and contrivances in connection with the purchase and sale of a security, in contravention of Rule 10b-5 (17 C.F.R. Section 240.10b-5) of the Rules and Regulations promulgated by the United States Securities and Exchange Commission, and did (a) employ a device, scheme and artifice to defraud, (b) make

untrue statements of material facts and omit to state material facts necessary in order to make the statements made, in light of the circumstance under which they were made, not misleading, and (c) engage in acts, practices and a course of business which would and did operate as a fraud and deceit upon a person in connection with the purchase and sale of a security, in violation of Title 15, United States Code, Sections 78j(b) and 78ff.

**C. THE MANNER AND MEANS OF THE CONSPIRACY**

It was a part of the conspiracy that:

14. The Defendants, and their coconspirators and agents, would and did interpret the above-mentioned Wall Street Journal article as identifying a serious and increasing "gap" or "disconnect" between Dynegy's earnings and its cash flows from energy trading, or "risk-management," activities. The Defendants, and their coconspirators and agents, decided to respond to and fend off the Wall Street Journal's criticism by improving the "risk-management activities" line of the "cash flows from operating activities" section of the cash flow statement in Dynegy's quarterly (Forms 10Q) and annual (Form 10-K) reports filed with the SEC. Dynegy's cash flows from risk-management activities line had been consistently negative in previous reporting periods. This approach in responding to the Wall Street Journal article was referred to as a way to better "match" cash flow to earnings.

15. To better "match" Dynegy's earnings and operating cash flows, the Defendants, and their coconspirators and agents, would and did conceive, design and execute a plan to borrow money: that is, to engage in a "financing activity" but make it appear that the borrowed funds were cash flow from Dynegy's "risk-management activities" to create the false impression and illusion that Dynegy's cash flows from risk-management activities were much improved and that its earnings were of sufficient quality to justify, maintain and increase Dynegy's stock price, and to avoid the potentially adverse effect of a downgrade of Dynegy's credit rating.

16. The Defendants, and their coconspirators and agents, called the plan "Project Alpha".

17. The Defendants, and their coconspirators and agents, knew and intended that, during the first nine months ending on December 31, 2001, Project Alpha would create the appearance of improved cash flows from risk-management activities through the execution of an essentially circular break-even five-year natural gas contract between Dynegy and a specially-created corporation, sometimes referred to as either a Special Purpose Entity ("SPE") or a Special Purpose Vehicle ("SPV"). Project Alpha was to be funded with loans from financial institutions that included Citibank/Salomon Smith Barney (sometimes hereinafter "Citibank" or "Citi"), Deutsche Bank and Credit Suisse First Boston (the "Project Alpha Lenders"). The Project Alpha Lenders expected and required full repayment, with



interest, or a similarly assured return.

18. The Defendants, and their coconspirators and agents, knew and intended that the SPE (named ABG Gas Supply) would purchase natural gas on the open market at market prices and then resell it to Dynegy at a discount so that Dynegy could then resell that natural gas on the open market at market prices during the first nine months of Project Alpha. The resale would generate positive cash flow for Dynegy in the approximate amount of Three Hundred Million Dollars (\$300,000,000). The Defendants, and their coconspirators and agents, further knew and intended that over the remaining 51 months of the 5-year term of Project Alpha's circular break-even natural gas contract, the SPE would purchase natural gas from the open market at market prices and then resell it to Dynegy at a premium so that the Project Alpha Lenders would be fully repaid, with interest.

19. To ensure the Project Alpha Lenders demand of full repayment, with interest or other assured return, the Defendants, and their coconspirators and agents, did secretly adopt a 100% hedging strategy and did secretly add special "tear up" language to the Project Alpha transaction documents. Thus, as the Defendants and their coconspirators and agents well knew, intended, and believed, Project Alpha was, in fact, a loan structured to appear as a 5-year natural gas contract that should have been disclosed as cash flows from financing activities: that is, as a loan (debt)

rather than as cash flows from risk-management (operating) activities in Dynegy's financial statements (Forms 10-Q and 10-K) for the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> quarters of, and for the year, 2001.

20. The Defendants, and their coconspirators and agents, knew and understood that Generally Accepted Accounting Principles ("GAAP") required that an SPE be an independent entity and that the SPE, and the financial institutions that funded the SPE, could not be assured or guaranteed full repayment of, or a return on, their investment, but had to bear some risk of losing money. The Defendants, and their coconspirators and agents, knew this because Dynegy's auditors had warned that either a 100% hedging strategy or "tear up" language would prevent Dynegy from reporting the cash flow from the Project Alpha natural gas contract as cash flows from risk-management activities in its publicly-filed financial statements. Notwithstanding the warning of Dynegy's auditors, the Defendants, and their coconspirators and agents, intended to, decided to, and did implement a 100% hedging strategy and did include "tear up" language in the Project Alpha documents to protect and to ensure that the Project Alpha Lenders would not lose money.

21. The Defendants, and their coconspirators and agents, did intentionally conceal from Dynegy's auditors, the SEC, Rating Agencies, lenders, market and securities analysts, and the investing public, the implementation and effect of the 100% hedging

strategy and the "tear up" language. In doing so, the Defendants, and their coconspirators and agents, knew and intended that Dynegy would and did falsely report to the SEC, Rating Agencies, lenders, market and securities analysts, and the investing public, by means of electronic filing of Quarterly Reports ("Forms 10-Q") and an Annual Report ("Form 10-K"), that approximately \$300,000,000 of "cash flows from financing activities" were "cash flows from operating activities", or more specifically, "cash flows from Risk-management activities," throughout the last 9 months of the year 2001.

22. The Defendants, and their coconspirators and agents, caused Dynegy's auditors to mail, and Dynegy did in fact receive, through the United States mail, an accounting opinion (sometimes referred to as an "SAS 50" letter) advising that Dynegy could report cash flows resulting from the Project Alpha natural gas contract in the "operating cash flows" section of Dynegy's Forms 10-Q and 10-K. As the Defendants, and their coconspirators and agents intended, the accounting opinion provided by Dynegy's auditors and the representation letter upon which it was based, did not reflect the hedging and "tear up" features of Project Alpha that made the transaction, in fact, a financing activity: that is, a loan (debt).

23. On or about May 10, 2001, the Defendants circulated via email among themselves documentation reflecting the "tear up" and 100% -- or "back-to-back" ("BTB") - hedging features of the Project

Alpha transaction that had been, and would continue indefinitely to be, concealed from Dynegy's auditors, the SEC, Rating Agencies, lenders, market and securities analysts, and the investing public, and the Defendants knew, acknowledged and agreed that this documentation should "never, never, never, go to anyone" because they were "the only ones that have complete knowledge of this transaction."

24. In this manner, by the use of the means and instrumentalities of interstate commerce, including interstate wire communications and the mails, the Defendants, and their coconspirators and agents, caused Dynegy's cash flow from operations, and more specifically, from Risk-management activities, to be materially overstated in the second, third, and fourth quarters of 2001, and willfully omitted material facts necessary to make the statements made in Dynegy's financial statements, in the light of the circumstances in which they were made, not misleading, in documents filed with the SEC and intended for consideration by the Ratings Agencies, lenders, market and securities analysts, and the investing public in connection with the purchase and sale of stock and securities of Dynegy, Inc.

25. In furtherance of the conspiracy, and to effect the objects thereof, the Defendants, and their coconspirators, committed the following overt acts, among others, on or about the following dates:

<u>OVERT ACT</u>	<u>DATE</u>	<u>OVERT ACT</u>
1	March 16, 2001	Jamie OLIS had a conversation with representatives of Deutsche Bank in which OLIS suggested that (SPE) ABG Gas Supply would be owned by a newly created corporation that would, in turn, own the gas swaps for 0.125% (the "Deutsche Bank swaps") implementing the 100% hedging strategy.
2	March 23, 2001	Jamie OLIS caused Dynegy's lawyer to send out an email saying that since the Deutsche Bank swaps were not approved by Arthur Andersen, they could not be referred to in the ABG documents.
3	March 23, 2001	Helen Christine SHARKEY sent via email from New York, New York to the Houston, Texas office of Arthur Andersen, a draft accounting opinion in which she tried to delete language referring to the "tear ups" in an effort to ensure that they were not discovered by Arthur Andersen.
4	March 26, 2001	Helen Christine SHARKEY sent an email to a Dynegy employee saying: "The best thing Gene/Jamie did was to send the AA tax guy home - he would run out of the room and call Hecker/Marshall, which caused me a LOT of heartburn....."
5	March 28, 2001	Helen Christine SHARKEY caused a Dynegy employee to send an email to Dynegy's lawyers telling them: "we cannot have tear up language on the interest swap either at the DHI level, so the side agreement with Citi will need to refer to both of the gas and interest rate swaps."

- 6 April 6, 2001 Jamie OLIS, Gene Shannon FOSTER and Helen Christine SHARKEY caused a representative of Citibank to sign a Confirmation of a Commodity Swap Transaction - Cash Settled for 10,000 MMBtus of natural gas with ABG Holding LLC and bearing No. 30010045 to implement and attempt to implement the 100% hedging strategy.
- 7 April 6, 2001 Jamie OLIS, Gene Shannon FOSTER and Helen Christine SHARKEY caused an employee of Dynegy to sign an Amendment to Confirmation referencing ABG Holding LLC Commodity Swap Transaction - Cash Settled No. 30010045 to implement and attempt to implement the plan to include "tear up" language in the Project Alpha transaction documents.
- 8 April 10, 2001 Jamie OLIS sent via email to an Arthur Andersen accountant a schedule of "Alpha Transaction Amounts" that omitted information about the 10,000 MMBtus Fixed Gas Swap at ABG Holdings LLC.
- 9 April 24, 2001 Helen Christine SHARKEY sent an email to Jamie OLIS telling him not to provide information about other hedging activity to Arthur Andersen.
- 10 April 24, 2001 Jamie OLIS, Gene Shannon FOSTER and Helen Christine SHARKEY caused Arthur Andersen to mail Dynegy an accounting opinion advising that Dynegy could report cash flows from Project Alpha in its financial statements as an adjustment to its "operating cash flows."
- 11 May 11, 2001 Jamie OLIS sent an email saying: "Probably already know this but huge issue to us so I'll nag. It is very important that we keep structure charts and other written info to an absolute minimum on this deal."

- 12            May 11, 2001            Gene Shannon FOSTER sent an email to Jamie OLIS acknowledging his assent by saying "Nagging is fine."
- 13            August 6, 2001            Jamie OLIS caused a Dynegy employee to respond via email to a request for documents made by Dynegy accountants which response provided documents other than the outside gas swaps or amendments to confirmations containing "tear up" language.
- 14            August 14, 2001            Jamie OLIS, Gene Shannon FOSTER and Helen Christine SHARKEY caused the filing of Form 10-Q, Quarterly Report for Dynegy, Inc., for the Second Quarter 2001 with the SEC in which cash flows from Project Alpha were reported as Cash Flows from Risk-Management Activities.
- 15            September 14, 2001            Jamie OLIS sent an email to Gene Shannon FOSTER confirming that a Dynegy employee had gone through and identified the documents that Arthur Andersen could have versus the documents they could not have.
- 16            October 30, 2001            Jamie OLIS, Gene Shannon FOSTER and Helen Christine SHARKEY caused the filing of Form 10-Q, Quarterly Report for Dynegy, Inc., for the Third Quarter 2001 in which cash flows from Project Alpha were reported as Cash Flows from Risk-Management Activities.
- 17            January 9, 2002            Gene Shannon FOSTER sent an email to a Dynegy employee explaining that an effort to make a second proposed Project Alpha-type transaction look different was because it was intended that Project Alpha not be disclosed.

- 18            January 31, 2002            Jamie OLIS sent an email to Gene Shannon FOSTER suggesting that someone kill the second Project-Alpha type transaction because it could jeopardize Project Alpha and "make me cry at the hands of a good litigator on the witness stand."
- 19            March 13, 2002            Jamie OLIS, Gene Shannon FOSTER and Helen Christine SHARKEY caused the filing of Form 10-K, Annual Report for Dynegy, Inc. for the Year 2001 in which cash flows from Project Alpha were reported as Cash Flows from Risk-Management Activities.
- 20            March 24, 2002            Jamie OLIS sent an email suggesting changes to a draft press release in response to an anticipated Wall Street Journal Article critical of Project Alpha, saying that, when he put down on paper how the Project Alpha cash flows turned negative after the first nine months, he "hated" how that read.

In violation of Title 18, United States Code, Section 371.

COUNT TWO

Securities Fraud - 15 USC §§ 78j(b)& 78ff; 17 C.F.R. § 240.10b-5

1.    The Grand Jury realleges and incorporates herein paragraphs 1 through 12 and 14 through 25 of Count One of this Indictment.

2.    From on or about August 2000 and continuing through on or about April 2, 2002, in the Houston Division of the Southern District of Texas, and elsewhere, the Defendants,



JAMIE OLIS  
GENE SHANNON FOSTER

and

HELEN CHRISTINE SHARKEY

aided and abetted by others known and unknown to the Grand Jury, unlawfully, willfully and knowingly, by the use of means and instrumentalities of interstate commerce, and of the mails and of facilities of the New York Stock Exchange, a national securities exchange, did directly and indirectly use and employ manipulative and deceptive devices and contrivances in connection with the purchase and sale of a security, in contravention of Rule 10b-5 (17 C.F.R. Section 240.10b-5) of the Rules and Regulations promulgated by the United States Securities and Exchange Commission, and to (a) employ a device, scheme and artifice to defraud, (b) make untrue statements of material facts and omit to state material facts necessary in order to make the statements made, in light of the circumstance under which they were made, not misleading, and (c) engage in acts, practices and a course of business which would operate as a fraud and deceit upon a person in connection with the purchase and sale of the securities of Dynegy, Inc.,

In violation of Title 15, United States Code, Sections 78j(b) and 78ff and Title 17 C.F.R. § 240.10b-5 and Title 18, United States Code, Section 2.

COUNT THREE

18 U.S.C. §1341 - Mail Fraud

1. The Grand Jury realleges and incorporates by reference, as though fully set forth herein, the allegations in paragraphs 1 through 12 and 14 through 25 of Count One of this Indictment.

2. On or about the following dates, in the Houston Division of the Southern District of Texas and elsewhere, the defendants,

**JAMIE OLIS**

**GENE SHANNON FOSTER**

**and**

**HELEN CHRISTINE SHARKEY**

and others, known and unknown to the Grand Jury, knowingly devised and intended to devise a scheme and artifice to defraud and to obtain money and property by means of material false and fraudulent pretenses, representations and promises, and for the purpose of executing the scheme and artifice to defraud, and attempting to do so, knowingly caused to be placed in an authorized depository for mail matter to be sent and delivered by the United States Postal Service, by any private or commercial interstate carrier, such as Federal Express, and caused to be deposited and sent or delivered according to the directions thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, the following mail matter:

COUNT

DATE

MAIL MATTER

THREE

April 24, 2001

An accounting opinion (sometimes referred to as an "SAS 50" letter) advising that Dynegy could report cash flows from the Project Alpha natural gas contract in the "operating cash flows" section of Dynegy's Statement of Cash Flows, addressed to Mr. David R. Roth, Dynegy Holdings, Inc., 1000 Louisiana, Suite 5800, Houston, Texas 77002-5050.

In violation of Title 18, United States Code, Sections 1341 and 2.

COUNTS FOUR, FIVE, and SIX

18 U.S.C. §1343 - Wire Fraud

1. The Grand Jury realleges and incorporates by reference, as though set forth in full herein, the allegations set forth in paragraphs 1 through 12 and 14 through 25 of Count One of this Indictment.

2. On or about the following dates, in the Houston Division of the Southern District of Texas and elsewhere, the defendants,

JAMIE OLIS

GENE SHANNON FOSTER

and

HELEN CHRISTINE SHARKEY

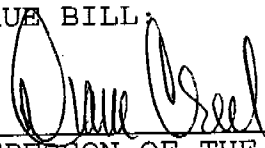
for the purpose of executing and attempting to execute a scheme and artifice to defraud and for obtaining money and property by means of material false and fraudulent pretenses, representations and promises, including but not limited to representations and

pretenses about the effect of Project Alpha on Dynegy's financial statements, did transmit and cause to be transmitted in interstate commerce by means of a wire communication, certain signals; that is, the electronic filing of the following documents, each of which supported the false pretenses and false representations described herein, with the Securities and Exchange Commission:

<u>COUNT</u>	<u>APPROXIMATE DATE of ELECTRONIC FILING</u>	<u>DOCUMENT FILED</u>
FOUR	August 14, 2001	Form 10-Q, Quarterly Report for Dynegy, Inc., Second Quarter 2001
FIVE	October 30, 2001	Form 10-Q, Quarterly Report for Dynegy, Inc., Third Quarter 2001
SIX	March 13, 2002	Form 10-K, Annual Report for Dynegy, Inc. for Year 2001

In violation of Title 18, United States Code, Sections 1343 and 2.

A TRUE BILL.

  
FOREPERSON OF THE GRAND JURY

MICHAEL T. SHELBY  
UNITED STATES ATTORNEY

By: 

Jimmy Sledge, Jr.  
Assistant United States Attorney